(22,982)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 150.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF MINNEAPOLIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 14, 1913

No. 17128.

STATE OF MINNESOTA,
Supreme Court:

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Plaintiff,
against
CITY OF MINNEAPOLIS, Defendant.

Certificate and Return of the Clerk of the District Court, Fourth Judicial District.

F. W. Root, Attorney for Appellant, C., M. & St. P. Ry. B'd'g.
C. J. Rockwood, Attorney for Respondent, Andrus Bldg.

(Endorsed:) Filed Mar. 22, 1911. I. A. Caswell, Clerk.

1 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff,
vs.
CITY OF MINNEAPOLIS, Defendant.

To C. J. Rockwood, Esq., attorney for the above named defendant, and to A. E. Allen, clerk of said District Court:

Please take notice, that the above named plaintiff appeals to the Supreme Court of the state of Minnesota, from the judgment of the said District Court entered herein on the 17th day of March, A. D. 1911, and from the whole thereof.

Dated this 18th day of March, A. D. 1911.

F. W. ROOT,
Attorney for Plaintiff.

Due service of the above notice of appeal is hereby admitted this 18th day of March, A. D. 1911, and defendant hereby waives any and all bonds and undertakings on appeal provided by law, and hereby stipulates that all further proceedings in said cause, on the part of the defendant, are hereby stayed in all respects as if all necessary bonds and undertakings had been duly given and filed herein; and notice of argument of said appeal is hereby waived.

Dated March 18th, 1911.

C. J. ROCKWOOD,
Attorney for Defendant.
A. E. ALLEN, *Clerk,*
By FRED S. CADY, *Deputy.*

2 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff,
vs.
CITY OF MINNEAPOLIS, Defendant.

The above entitled cause came on for hearing before the court without a jury on the 27th day of January, 1911, upon the agreed statement of facts for submission of the controversy, on file, F. W. Root appearing for the plaintiff and C. J. Rockwood, Esq., appearing for the defendant.

Upon considering the statements of facts and hearing the parties by their respective attorneys, the court made and filed its conclusions of law and order for judgment, and now, pursuant thereto, and upon motion of F. W. Foot, attorney for said plaintiff, it is adjudged and decreed, that the Chicago, Milwaukee & St. Paul Railway Company, plaintiff herein, recover of the City of Minneapolis, the defendant herein the sum of twenty-five hundred and fifty-four dollars ($2,554.00) damages, together with its costs and disbursements herein, taxed and allowed at the sum of fourteen dollars ($14.00), amounting in all to the sum of twenty-five hundred and sixty-eight dollars ($2,568.00); and that the plaintiff is entitled to no other or greater compensation either for the original cost or the future maintenance of such bridge.

Dated this 17th day of March, 1911.

By the Court:

A. E. ALLEN, *Clerk*,
By GEO. H. HEMPERLY, *Deputy*.

Filed March 17, A. D. 1911.
A. E. ALLEN, *Clerk*,
By GEO. H. HEMPERLY, *Deputy*.

3 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff,
vs.
CITY OF MINNEAPOLIS, Defendant.

This cause was heard by the court without a jury on the 27th day of January, 1911, upon the agreed statement of facts for submission of the controversy which is on file; F. W. Root appearing for the plaintiff and C. J. Rockwood for the defendant.

After hearing the parties the court finds as conclusions of law that the plaintiff is entitled to judgment against the defendant for the

sum of twenty-five hundred fifty-four dollars ($2,554.00), being the sum of ten dollars ($10.00), the agreed value of the land taken, together with the sum of twenty-five hundred forty-four dollars ($2,544.00), representing the cost of the architectural features of the bridge, according to the plans which the parties have mutually agreed upon and adopted.

The court further finds that the plaintiff is not entitled to recover any part of the cost of the bridge except that represented by the architectural features mentioned in the agreed statement, and is not entitled to recover anything upon account of the future maintenance of the bridge.

The court further finds that the taking of the property of said Railway Company, for the purposes and in the manner aforesaid, and with no other or greater compensation than as in this order provided, does not violate, or tend to violate, any provision of Section 13 of Article I of the Constitution of the State of Minnesota and is not in violation of any provision of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Let judgment be entered accordingly.

Dated February 23rd, 1911.

By the Court:

W. E. HALE, *Judge.*

Filed Feb. 23rd, 1911.
A. E. ALLEN, *Clerk,*
By F. S. CADY, *Deputy.*

4 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff,
vs.
CITY OF MINNEAPOLIS, Defendant.

A controversy which may be the subject of a civil action exists between the Chicago, Milwaukee & St. Paul Railway Company, herein for convenience called plaintiff, and the City of Minneapolis, a municipal corporation, herein for convenience called defendant (acting herein through the Board of Park Commissioners of the said City of Minneapolis), and it is proposed to submit, and the said parties do hereby submit, the same to the District Court of Hennepin County, Minnesota, the court which would have jurisdiction if an action were brought, and for that purpose the following case and statements of fact, upon which the said controversy depends, are made and submitted to the court.

1. The said Railway Company is a railroad corporation, or-
5 ganized and existing under and by authority of the laws of the state of Wisconsin and by authority of law owns lands and operates lines of railroads thereon in the states of Wisconsin, Minnesota and elsewhere. One of said lines of railway extends in a gen-

erally easterly and westerly direction across said city and across the intended route of a proposed canal to be constructed by the city, as hereinafter mentioned.

Within the corporate limits of said city are three meandered lakes, to-wit: Lake Calhoun, having an area of about 460 acres; Lake of the Isles, having an area of about 107 acres, and Cedar Lake, having an area of about 150 acres, each of said lakes is adapted for use by the public for pleasure boating, ice boating, skating and other like uses, and is actually used by the public for such purposes.

3. The City of Minneapolis has acquired for park and parkway purposes, in pursuance of Chapter 30 of the Special Laws of Minnesota for 1889 and Acts Amendatory thereof and Supplementary thereto all the lands constituting the shores of Lake Calhoun and Lake of the Isles as well as the southerly and westerly shores of Cedar Lake, also large tracts of land located near to said several lakes; all of which have been acquired and are actually used for park and parkway purposes for the use and benefit of the inhabitants of the said city and the public. A map marked "Exhibit A" is hereto attached and made a part of this statement showing said lakes in their location with reference to one another as well as lands in the vicinity of said lakes which have been acquired by the City
6 of Minneapolis for the purposes aforesaid; which lands so acquired are colored green on said map.

4. The said Board of Park Commissioners of the City of Minneapolis has determined for and in behalf of the city to construct and is now constructing, two canals for such public use, one connecting Cedar Lake with the Lake of the Isles and one, which, when completed, will connect Lake of the Isles and Lake Calhoun.

5. The construction of such canals will greatly enhance the usefulness of said lakes to the public for the purposes aforesaid.

6. Lake of the Isles is now connected with Lake Calhoun by a small water course, which crosses the right of way of the Railway Company at a point approximately fifty-nine feet east of the center line of the one hundred foot strip hereinafter described, and is carried under the railway tracks, as well as under the street and parkway, by a pipe about three feet in diameter, and there is a natural discharge of water through the same from Lake of the Isles to Lake Calhoun, and the two lakes are upon the same, or substantially the same level. The construction of such canal, connecting Lake of the Isles with Lake Calhoun, will render the said water course and pipe useless and permit the same to be closed. The locations of the proposed canal and water course are shown upon the map marked "Exhibit B," hereto attached and made a part of this statement.

7. The city seeks to condemn and take an easement in and upon a strip of land one hundred feet in width for the purpose of
7 such canal and for walks upon either side thereof, extending across the right of way and land of the Railway Company, as shown on said "Exhibit B." The land so proposed to be taken from the Railway Company is colored red on said map, and is described as follows:

All that part of the right of way of the Chicago, Milwaukee & St. Paul Railway Company in Section 33, Town. 29, Range 24, described as follows:

A strip of land one hundred (100) feet wide across said right of way, being fifty (50) feet on either side of a line drawn at right angles to the southerly boundary line of said right of way, through a point which is intersected by a line drawn at right angles to the southerly line of said Section 33 at a point therein distant 2,047.52 feet west from the southeast corner of the southwest quarter of said section.

8. At the point where it is sought to take such strip of land, and to construct and maintain such canal and walks, the railroad tracks of the Railway Company are upon an artificial embankment about sixteen feet above the natural surface of the land, and about eighteen feet above the established level of the surface of the water in said lakes and in the proposed canal, which established level is at an elevation of 144 feet above the city datum as fixed by the City of Minneapolis.

9. The construction and maintenance of such canal and walks will necessitate the construction of a bridge to carry the tracks of the Railway Company over the same.

8 Plans for the construction of said bridge have been prepared and submitted by said city through its Board of Park Commissioners, and have been accepted by said Railway Company, which said plans are marked "Exhibit C," hereto attached, and made a part hereof.

10. The estimated cost of a bridge constructed in accordance with such plans is the sum of eighteen thousand five hundred and thirteen ($18,513.00) dollars.

11. It is agreed that a bridge constructed in accordance with the plan usually and customarily adopted by said Railway Company, under such circumstances, would cost but $15,969.00, and that a bridge constructed in accordance with either such plan, would be sufficient for all purposes of necessity, the difference in such cost being due to architectural features.

12. It is agreed that the difference between the cost of a bridge constructed in accordance with said plans prepared by said City, and the cost of such a bridge as would customarily be constructed by said Railway Company is, in any event, to be borne and paid by said city.

13. The agreed value of the mere land so proposed to be taken, irrespective of any cost of construction of such bridge, is the sum of ten ($10) dollars.

14. Solely for the purposes of this proceeding the Railway Company waives any question of authority in the City to take an easement in the said land for the purpose aforesaid by pro-

9 ceedings in Eminent Domain, and, for these purposes only concedes such authority in said City.

It has been agreed, that the City take such easement by virtue of such power of Eminent Domain and construct such canal and walks, and that the Railway Company build, after City plans, the bridge

necessary for carrying its tracks; and that the Railway Company waive no damages or compensation to which it is entitled by law by virtue of such taking, and the city has bound itself to pay all such damages and compensation.

15. It is contended by said Railway Company that the judgment herein should award it, First, the sum of ten dollars as the agreed value of the easement in the land so to be taken; Second, a sum that will equal the entire cost of such bridge according to city plans; Third, such further sum as will be sufficient to maintain such bridge.

The Railway Company further contends, that to divest it of its property, appropriate the same to other uses, and subject it to great expense, without paying to the Railway Company not only the aforesaid agreed value of the mere land, but the entire cost of such bridge as well, together with a sum sufficient to maintain the same as the damages it must suffer by reason of the proposed taking and injury, will be a taking, destruction and damage of private property for public use without just compensation, in violation of Section 13 of Article I of the Constitution of Minnesota, which provides:

"Private property for public use. Private property shall not be taken, destroyed or damaged for public use, without just
10 compensation therefor first paid or secured."

And the Railway Company further contends that such divesture and appropriation without payment of all such value of land and all such cost of construction and maintenance together with all other damage reasonably incident to, and necessarily consequent upon, such taking, will constitute an abridgement of the privileges and immunities of the Railway Company as a citizen of the United States, and will deprive it of its property without due process of law, and will deny to it the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

16. It is contended by said City that the Railway Company is entitled, as its total compensation and damages for the taking of the proposed easement, and the consequent expense of such bridge, to nothing more than the aforesaid agreed sum of ten dollars, together with such sum as will, when added to the said sum
11 of $15,969, equal the total cost of such bridge so to be constructed according to city plans; and that the cost of constructing such bridge, to the extent of the said sum of $15,969.00, together with all cost of maintenance thereof, must be borne by the Railway Company alone.

17. The parties hereto do hereby mutually agree that the said contention and controversy shall be, and hereby is, submitted to the District Court for the County of Hennepin aforesaid, under and pursuant to Section 4286 of the Revised Laws of Minnesota for

1905, to adjudge the respective obligations of the parties, whether as to the construction of such bridge or as to its subsequent maintenance, and to adjudge and award to the Railway Company all such damages and compensation as it is entitled to under the foregoing agreed facts for and by reason of the taking aforesaid, and to render judgment therefor against the said City.

Dated September 27th, 1910.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By E. W. McKENNA, *Vice President.*
F. W. ROOT, *Attorney.*
CITY OF MINNEAPOLIS,
By C. J. ROCKWOOD, *Its Attorney.*

Form Approved,
BURTON HANSON.

12 District Court, Fourth Judicial District.

STATE OF MINNESOTA,
County of Hennepin, ss:

I, A. E. Allen, Clerk of the above named court, do hereby certify and return to the Supreme Court of the State of Minnesota, that I have compared the paper writing to which this certificate is attached with the original (1) Statement of Facts, (2) Order, (3) Judgment, (4) Notice of appeal with waiver of Bond, in the action therein entitled, as the same appear of record and on file in the said Clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at the City of Minneapolis, in said County, this 22nd day of March, A. D. 1911.

[SEAL.]

A. E. ALLEN,
Clerk of District Court.
W. I. HUGHES, *Deputy.*

13 17128.

STATE OF MINNESOTA, *ss:*

In Supreme Court, April Term, 1911.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

Assignment of Errors.

F. W. Root, Attorney for Appellant, Minneappolis, Minn.

Filed Jul. 10, 1910.
I. A. CASWELL, *Clerk.*

14 17128.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1911.

No. 14.

CHICAGO, MIL. & ST. PAUL RY. CO., Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

Assignment of Errors.

The court below erred in rendering judgment fixing the amount of compensation which the City should pay to the Railway Company on account of, and as incident to, the taking of said land, or an easement therein, at Two Thousand Five Hundred Fifty-four dollars ($2,554.00), instead of awarding an amount equal to the full actual cost of the bridge, required to carry the tracks of the Railway Company over the proposed canal, together with a sum sufficient to maintain said bridge, with $10.00 as the agreed value of the land, added thereto;

Because said judgment is not only unwarranted by law, but contrary to the provisions of Section 13 Article 1 of the Constitution of the State of Minnesota; and

Because said judgment is in violation of the provision of Section 1 of Article 14 of the Amendments to the Constitution of the United States and

Because said judgment would deprive the Railway Company of its property without compensation and without due process of law; and

Because said judgment does not apply the same rule to the Railway Company with respect to land held by it, as is applied to other owners of land, under similar circumstances.

F. W. ROOT,
Attorney for Appellant.

15 No. 17128. C., M. & St. P. Ry. Co., Appellant, vs. City of Minneapolis, Respondent. Opinion and Syllabus. Filed Oct. 27, 1911. I. A. Caswell, Clerk. October Term, A. D. 1911. Simpson, J. Start, C. J., dissents.

16 17128.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1911.

No. 11.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

Syllabus.

1. The rule that a railway company may be required to erect and maintain a bridge to carry its tracks over a street crossing, extends to all cases where the public safety, convenience or welfare require such bridge.

2. A waterway with walks on each side, duly established by public authority for public use, connecting navigable lakes and public grounds, as to the principles applicable thereto, is not distinguishable either by the fact that it is artificial or by the fact that it is in part a waterway, from a natural waterway or from a landway.

3. The rule applicable to crossings of streets and railroads applies to the crossing of a public canal and a railroad, and in proceedings to condemn a right of way for a public canal across a railway right of way, through an embankment, the company is not entitled to be awarded, as damages, the necessary expense of building a bridge to carry its tracks over the canal.

Judgment affirmed.

17 17128.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1911.

No. 14.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO., Appellant,
v.
CITY OF MINNEAPOLIS, Respondent.

Opinion.

This is an appeal from a judgment of the district court of the county of Hennepin in a controversy submitted on an agreed statement of facts pursuant to Sec. 4286 R. L. 1905. The stated facts are substantially as follows:

Within the corporate limits of the city of Minneapolis, the respondent herein, are three meandered lakes—Lake Calhoun, having an area of 460 acres; Lake of the Isles, having an area of 107

acres; and Cedar Lake, having an area of 150 acres. Each of these lakes is adapted for use by the public for pleasure boating, ice boating, skating and other like uses, and is actually used for the public for such purposes. The City of Minneapolis has acquired, for park and parkway purposes, all the lands constituting the shores of Lake Calhoun and Lake of the Isles, as well as a portion of the shores of Cedar Lake; also large tracts of land located near to said lakes, and such lands are used for park and parkway purposes.

18 The City of Minneapolis has determined to construct, and is now constructing, two canals for public use, one connecting Cedar Lake with the Lake of the Isles, and one connecting the Lake of the Isles with Lake Calhoun. The construction of such canals will greatly enhance the usefulness of said lakes to the public for pleasure boating, ice boating, skating and like purposes. Lake Calhoun and Lake of the Isles are separated by a narrow strip of land of varying width, at its narrowest point some 600 feet wide. The natural surface of this strip of land where the canal is being constructed is about two feet above the level at which the waters are maintained in Lake of the Isles and Lake Calhoun. There is between these two lakes a small natural water course in which water flows from Lake of the Isles to Lake Calhoun.

The appellant Railway Company is the owner of a right of way, a strip of land 100 feet in width, extending lengthwise along and near the center of the land between Lake Calhoun and Lake of the Isles. Along this right of way the appellant, long before any steps were taken by the respondent city to construct the proposed improvement had constructed an embankment which, at the point where the canal will intersect it, is about 16 feet in height above the surface of the ground, and about 18 feet in height above the established surface of the water in the lakes and in the proposed canal. Upon the surface of this embankment the company laid its rails and has operated and still operates a commercial railway over and along its said right of way.

19 To enable it to construct the proposed improvement, consisting of a waterway or canal with the walks upon either side thereof, the City seeks to condemn and take an easement in a strip of land 100 feet wide, extending across the right of way of the appellant. The taking of this land is for a public purpose and the City's right to so acquire this strip is conceded by the appellant railway company for the purposes of this appeal. The location of the proposed canal at the point where it crosses the railway tracks is immediately west of the natural water course between Lake Calhoun and Lake of the Isles, the center line of the proposed canal being 59 feet west of the point where the waters flowing in such natural course are carried through the embankment of the railway company in a pipe about 3 feet in diameter. The canal, when constructed, will take the place of and permit the closing of this natural channel.

The construction and maintenance of the waterway and walks through the embankment of the Railway Company will necessitate the construction of a bridge to carry the railway tracks over the

same. The agreed value of the strip of land 100 feet wide taken from the appellant for the public way is $10, and the cost of the construction of an adequate bridge over the canal and walks is $15,969. To such cost of the bridge is added, for purely ornamental features contained in the plans adopted by the parties hereto, the sum of $2544. This added cost for ornamental features is assumed by the city. By further agreement of the parties, the city is authorized to take the land involved and construct the proposed
20 improvement. The Railway Company is to construct the bridge as planned, waiving no claim, however, for damages or compensation to which it is entitled under the law by virtue of such taking as in condemnation proceedings, and the city is obligated to pay all such damages and compensation Upon trial of the matters so submitted, the court, upon the admitted facts, assessed the appellant's compensation for the taking and damaging of its property for the construction and operation of the public way, in the sum of $2554, being $10, the value of the land taken, and $2544 the cost of the ornamental features of the bridge, and disallowed the railway company's claim for the cost of constructing an adequate bridge.

By its appeal the Railway Company presents for consideration and decision, the question whether it is entitled to have included in the assessment of its damages for the taking and injuring of its property for a public use, the cost of constructing a sufficient bridge made necessary by such use. The contention of the appellant is that the taking of its property for this public use, without making compensation including not only the value of the land taken but as well the resulting expense of the construction and maintenance of a bridge, will be a taking, destruction and damaging of private property for public use without just compensation, in violation of Sec. 13, Art. 1, Const. of Minn., and will constitute as well a violation of the 14th amendment to the Constitution of the United States.

This contention is based on the claim that the bridge is made
21 necessary solely through the exercise of the right of eminent domain by the city, and that—because no question of safety of the crossing of the railway tracks and the public way is involved—the railway company cannot be required, by an exercise of the police power, to bear the uncompensated burden of building the bridge.

In considering the question thus presented there is no difficulty in determining the nature of the way here involved established by the city between the lakes and between the surrounding parks and parkways. Such nature clearly appears from the stated facts. Lake Calhoun and Lake of the Isles are public navigable waters, and the proposed waterway connecting them will, when established, be a public navigable waterway. Such connecting waterway will enhance the usefulness of the lakes in affording opportunity to the public for recreation and pleasure. Such waterway will thereby directly tend to promote the health, happiness and welfare of the public. When this waterway is established, the fact that it is artificial does not distinguish it as to the law applicable thereto from a

natural water course. Nor does it differ in nature and applicable rules from a landway. The landway, like this waterway, is artificial, laid out and established to meet the public need and promote the general welfare.

The proposed way has on each side walks, and the bridge in question in part is necessary to permit the establishment and use of these walks crossing under the tracks. By the concession of the
22 right of the city to condemn the railways property for this use, the reasonable necessity and convenience to the public of these foot-ways as well as of the waterway is admitted for the purposes of this appeal.

Nor does the fact that the waterway and walks will be used in connection with the lakes and parkway for pleasure and recreation distinguish, as to the legal principles applicable, this way from a road or canal devoted to the movement of goods or other commercial purposes. The desirability of conserving, extending and maintaining reasonable opportunities for wholesome public recreation is continually gaining in general recognition, because such opportunities and the use thereof concededly tend to promote the general health and welfare of the people. This court has said, speaking of inland lakes:

"We are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule."

Lamprey v. State, 52 Minn., 181.

The same view is expressed by another court in the statement:

"Its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose."

Grand Rapids v. Powers, 89 Mich. 94.

23 The way sought to be established—a canal or waterway with walks along each side—being clearly a public way, subject to the rules governing public ways, we are concerned with the nature of the property rights and duties of the railway company involved in crossings of railroads and public ways.

The general principle applicable to such crossings has been determined and announced in this state and applied to one kind of crossing. The same general principle has been applied in other jurisdictions to other crossing- until the law relating to establishing and maintaining public ways and improvements across railway tracks, including the incidental questions of the resulting duty of the railway company and just compensation for its property taken or injured, seems clearly settled. The general rule so established is that where the safety, convenience or welfare of the public require that a railway company carry its tracks over a public way or the public way over its tracks by a bridge, the uncompensated duty of providing such bridge devolves upon the railway company. the basis of this rule is the superior nature of the public right inherent in the reserved or police power of the state. A railroad, though constructed first in time, is constructed subject to the implied right of the state to lay out and open new highways crossing its

right of way. If the operation of the railway upon a particular surface or with a particular form of support for its tracks interferes with the public safety, convenience or welfare in the exercise
24 of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable readjustment of its tracks as will permit the exercise of the superior public right. In State ex rel. v. St. P. M. & M. Ry. Co., 98 Minn., 380, and State ex rel. v. N. P. Ry. Co., 98 Minn. 429, this court announced these general principles and applied them to crossings of city streets and the tracks of railway companies, and held that where railway tracks cross a city street the uncompensated burden of constructing and maintaining a bridge to carry its tracks over the street, or to carry the street over its tracks, is upon the railway company, if such bridge is necessary to make such crossing reasonably safe for use by the public; and this, though the railway company acquired its property and operated its road over the place involved before the street was established.

Counsel of the appellant railway company contends that the instant case on its particular facts should be distinguished from the above cases, because in this case of a waterway crossing railway tracks a grade crossing is impossible, the dangers incident to a grade crossing do not arise, and hence the uncompensated burden of building a bridge cannot be placed upon the railway company under the police powers of the state. We think this contention could be sustained only by placing an unreasonable limitation on the doctrine announced in the crossing cases, and by considering as controlling superficial facts about the proposed way rather than its conceded nature.

25 The opinion in State ex rel vs. St. P. M. & M. Ry. Co., supra, discusses and affirms the right of the state in the exercise of the police power to require safety devices or bridges at crossings so that the public using the street will not be subjected to danger. The danger in grade crossings was the particular thing in that case calling for an exercise of the police power. But it was not the announcement of the safety device rule that made this case a leading and important one in this state. The safety device rule had been announced in earlier decisions. The important rule announced in the later case is:

"A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense, suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed."

and further that:

"Cases where one railroad crosses another have no application, because both stand on an equality respecting rights and obligations,

while in cases like that at bar the rights of the public are superior."

The doctrine thus announced does not limit the power of the state to require railways to adapt their tracks to the use by
26 the public of highways to cases where the use of the highway as laid out and used involves no danger to the public. The police power of the state is concerned with the convenience and welfare of the public as well as its safety. Nor on principle could the general doctrine so announced be limited to streets and highways as distinguished from other necessary public easements crossing the company's right of way.

In State ex rel. v. District Court for Hennepin County, 42 Minn., 247, a distinction is made between necessary planking and safety devices at street crossings. Such distinction, as was pointed out in State ex rel. vs. St. P. M. & M. Ry. Co., above, is not recognized by the authorities sustaining and applying the broad rule announced in the later Minnesota case. These authorities do not limit the application of the rule to the requirement of safety devices.

In C. & I. W. Ry. Co. vs. City of Connersville, 170 Ind. 316, the court passed upon the question of the compensation to which the railway company was entitled in condemnation proceedings instituted by the city to open a street across the railroad right of way. The tracks of the railway company were on an embankment 15 feet above the natural surface of the ground. The proposed street extended across the right of way below the tracks through this embankment, thus making necessary a bridge to carry the tracks over the street. No compensation was allowed to cover the cost of the erection and maintenance of this bridge. It is apparent that
27 in the Indiana case the dangers of a grade crossing were in no way involved. The only street proposed passed under the railway tracks. In denying the claim of the railway company for such compensation, it is stated:

"Appellant's counsel overlook the fact that there are two distinct principles of law that operate upon the question we have under consideration; namely, 'eminent domain,' which implies a taking by the sovereign for some public benefit, and the 'police power,' which implies a regulation by the sovereign of private property for the preservation of the public safety, health and general welfare."

This case being taken to the U. S. Supreme Court, the decision of the state court was affirmed in this language:

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court. * * * The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within
28 whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments

not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.'" C. & I. W. Ry. Co. vs. City of Connersville, 218 U. S. 336.

Under this rule as applied in the Indiana case—and this is clearly the same rule as that announced in this state in State ex rel. v. St. P. M. & M. Ry. Co., supra—if the City of Minneapolis were opening a street under the tracks and through the embankment of the appellant Railway Company the Company would not be entitled to compensation for the necessary bridge. It is clear that no distinction in law exists between such supposed improvement and the one actually proposed to be made. Each is a public way opened below the tracks through the embankment of the railway company, making necessary a bridge to support the track. It would be no more possible for the Railway Company to reconstruct its railway across such a street without a bridge than it is to carry its railway over the proposed canal without a bridge. No property right of the railway company can be interfered with by the removal of its supporting embankment for a waterway that is not interfered with to the same extent by the removal of the embankment for a landway.

Even the superficial facts concerning the two ways differ
29 little. The proposed way here involved has two walks under the tracks through the embankment, the reasonable necessity of which is conceded. These walks make necessary a bridge. The fact that the public has determined that it will be better served by a portion of the way being water instead of land cannot, on any legal principle, shift the burden of a required bridge from the railway company to the public. The Railway Company is not vested with a property right that can discriminate between public travel passing under its tracks on wheels and in boats. The superficial differences could be further lessened by assuming that a driveway had been laid out along the canal crossing the right of way, or that a waterway was extended to each side of the right of way with a portage beneath the tracks.

Nor is the general rule requiring railway companies to adjust their tracks to public improvements when the public convenience or welfare requires, limited in its application to traveled ways.

In C., B. & Q. R. Co. v. Illinois, 200 U. S. 561, was involved the question of the right to compel a railway company to enlarge a bridge, without compensation, to permit the passage down a natural waterway of waters collected by a system of drainage. The Railway Company had for years, at a point where its tracks cross a creek, maintained a suitable culvert sufficient to allow the passage of the waters naturally flowing in the creek. Drainage commissioners having determined to drain a large district into and through the
30 creek in order to reclaim and make tillable wet lands, notified the railway company to enlarge and widen the culvert through its right of way. The company refused to comply with this requirement unless compensated for the expense incurred. The court in holding that the company might be required to construct the abutments and bridge, without compensation, stated:

"The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the
31 public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. * * * If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case."

In C. & E. Ry. Co. v. Luddington, 91 N. E. 939, it is held that the rule applicable to highways is also applicable to public ditches established across the right of way of a railway company, and that compensation need not be made to the railway company to cover the cost of a bridge made necessary to carry its tracks over the ditch.

In C., B. & Q. R. R. Co. v. Board of Supervisors, 182 Fed., 291 (8th Circ.) it is held:

"In proceedings to condemn right of way for a public drainage ditch across a railroad the company is not entitled to be awarded as damages the expense of building a new bridge over the ditch, but its damages are confined to the value of the easement across its right of way, regardless of whether or not the ditch follows a natural water course over its right of way."

In W. C. Street Ry. Co. v. People, 214 Ill., 9, 201 U. S.
32 506, and in Union Bridge v. United States, 204 U. S. 364, the duty of a railway company to adapt, without compensation, its tracks to changes made in navigable streams is affirmed. In the latter case this language is adopted:

"The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public."

In New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, another application was made of the same general rule. A gas company had laid its pipes in the streets of the city, under a franchise, at the place indicated by the public authorities. Afterwards the city established a drainage system, the construction of which required a change in the location of the gas pipes. It was held that the company property was not taken or injured by the requirement of such change for the reason assigned, among others:

"When it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made. * * *
33 In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is damnum absque injuria."

It appears from these cases,—and many other similar cases might be referred to—that the principle announced by this court in State ex rel. v. St. P., M. & M. Ry. Co., supra, while there applied to the requirement of a safety device at a street and railway crossing, is not limited either to the requirement of safety devices or to crossings of streets and railway tracks, but is broadly applicable to public improvements crossing the railway tracks whenever, to permit such crossing, the convenience or welfare, as well as the health or safety, of the public require a reasonable readjustment by the company of the means for supporting its tracks. Under modern conditions railway companies are pioneers in development. Railroads are constructed usually in advance of the public ways and improvements made necessary by subsequent settlements. The railroad is thus first constructed making provision for existing land and waterways, but without reference to subsequent improvements. By such construction natural conditions are changed. Solid embankments may be erected across low lands, or deep cuts made through high lands. But it is not clearly established in this state, as in most states, that the company so builds its road subject to the reserved right of the public to lay out highways, locate drains, establish or improve
34 waterways across the company's right of way when the necessity therefor arises. For the property taken in making such improvements compensation must be made, but for the incidental expense in making reasonable changes in the method of carrying its tracks over such improvements when public safety, health, convenience or welfare require such change, no compensation can be claimed by the railway. Such change is required under the reserved or police power of the state.

In the instant case the railway company constructed and placed its rails on a 16 ft. embankment along a strip of land 600 feet wide separating two navigable lakes, confining a natural water course between the lakes in a pipe through such embankment. The company, by such construction, did not acquire such a property right in maintaining its tracks on the embankment that it is entitled to compensation for the cost of a necessary bridge to carry its tracks over a public way thereafter duly established across its right of way. The public right to lay out such way, though asserted subsequent in time to the construction of the road, is so far the prior and superior right that the company is required to make such reasonable readjustment of its tracks as is necessary to permit of the safe and convenient use of the public way. The requirement of such readjustment is not a taking or injuring of property, but rests on the exercise of the reserved or police power of the state. The proposed way is made up of a waterway and walks on each side. The waterway takes

the place of the existing natural water course, and becomes,
35 like the lakes it connects, public navigable water. A bridge to carry the railway tracks over this way is a necessary incident of its use by the public, and is required by public convenience and welfare. These facts clearly bring the instant case within the general principle announced in State ex rel. v. St. P., M. & M. Ry. Co., supra, and within the applications of that principle as repeatedly made by the authorities in the federal and state courts.

It follows that the trial court properly refused to include in the compensation allowed the railway company the item of the cost of a bridge—exclusive of ornamental features—required to carry the tracks of the railway company over the newly established public way.

Judgment affirmed.

SIMPSON, *J.*

36 I dissent. The short facts are these:

Lake Calhoun and Lake of the Isles, meandered lakes within the territorial limits of the city of Minneapolis, are separated by a narrow strip of land six hundred feet in width at its narrowest point. The appellant owns a strip of land one hundred feet wide along the entire length of the strip separating the lakes, whereon it has constructed its railroad bed and embankment, which are some sixteen feet in height, and laid its track thereon. The respondent city has acquired the shores of the lakes for park purposes, and seeks to acquire, by the exercise of the power of eminent domain, the right to construct a canal and a walk on each side thereof, through a strip one hundred feet in width, of such tract, to connect the waters of the lakes. This will materially enhance the public use of the lakes for pleasure and ice boating, skating, and like uses. The taking of appellant's land for the canal will, for all practical purposes, divide it into two parts and necessitate the construction of a bridge over the canal to connect the separated parts of its land, and thereby restore its roadbed to its original condition of safety and utility. The two lakes are not connected by any natural water course, except that at a point fifty-nine feet east of the center line of the proposed canal, where it will cross appellant's right of way, there is a small water course, the waters of which, coming from Lake of the Isles, are discharged into Lake Calhoun through a pipe three feet in diameter placed under the appellant's railroad bed. When the canal is constructed, this water course and pipe will be useless and they can be closed.

37 The question presented by the record is whether the appellant is entitled to have included in the assessment of its damages, for the taking and damaging its property, so taken for a public use, the necessary cost of constructing a bridge over the canal so as to connect the parts of its roadbed, divided by the canal. The contention of the city, which the court sustains, is that the appellant is not entitled to have included in its damages such cost, for the reason that public safety, convenience and welfare require the construction of the bridge, hence in the exercise of the police power the uncompensated duty of building the bridge may be imposed upon

the appellant. It must be conceded that if the bridge in this case is a necessary safety device, to protect the public from the dangers arising from railway grade crossings over public ways, the uncompensated duty of constructing and maintaining it may, in the exercise of the police power, be imposed upon the appellant. The question, however, is, Do the special facts of this case bring it within the rule stated? How can the bridge in any manner conserve the safety of the public in using the canal? There can, from the very nature of the case, be no grade crossing of a railroad and a canal. Nor can the construction of this bridge promote in any manner public convenience or welfare, for the sole necessity for and function of the bridge will be to connect the parts of the appellant's land which will be separated by the canal, and thereby restore the roadbed to its original condition of safety and utility.

38 The court in its opinion seem to attach much importance to the fact that there is to be a walk on each side of the canal. I am unable to understand how such fact can be regarded as specially weighty. The walks are a mere incident to the canal, and if the bridge is not essential as a safety device to the canal proper it cannot be as to the walks on each side of it.

Again, the facts of this case do not present any question of the safety of navigation, or of a natural water course to be widened or deepened, or of the obstruction of navigable waters, or of public drainage. We have simply the question whether the state may, in the exercise of its police power take dry land for the purpose of creating an artificial water course without any compensation except the mere value of the land taken. It is true that when the right to convert such land into an artificial water course is once secured by the exercise of the power of eminent domain and the payment of just compensation, the waters of the artificial course become public waters and the right of public navigation thereof paramount, but not before. In the very nature of the case the doctrine of the paramount right of public navigation cannot have any application to dry land in case the state seeks to take it by the exercise of the power of eminent domain, in order to convert it into an artificial water course. Any attempt to assess the appellant's damages for taking its land for the creation of an artificial water course on the basis of rights and benefits which will accrue to the public after it has secured the

39 right to take the land and convert it into a canal, would violate the plainest principles of natural justice.

I am, therefore, of the opinion that the uncompensated duty of constructing the bridges here in question cannot, upon the particular facts of this case, be imposed upon the appellant in the exercise of the police power of the state, and that the cost of the bridge ought to have been included in its damages. In reaching this conclusion I am not unmindful of the fact that the police power is an essential and beneficent attribute of sovereignty, the exercise of which, pursuant to valid legislative authority, cannot be controlled by the courts. But when, as is too often the case, such power is invoked, to justify the confiscation of private property for public use in violation of constitutional guaranties, the courts may and must interfere

for the protection of the citizens' constitutional rights. The police power cannot be used as a mask for removing private property from the protection of the constitution.

START, *C. J.*

40 17128. State of Minnesota Supreme Court. Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent. Judgment Roll. Filed November 9, 1911. I. A. Caswell, Clerk.

41 State of Minnesota Supreme Court, General October Term, A. D. 1911.

Wednesday morning, 9:30 o'clock, October 4, A. D. 1911. Court convened pursuant to adjournment. All the Justices being present.

Reg. No. 17128. Cal. No. 14.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true copy.

Attest:

I. A. CASWELL, *Clerk.*

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk,*
By —— ——, *Deputy.*

42 17128. State of Minnesota Supreme Court. Copy of Minutes of Argument. Filed November 9, 1911. I A. Caswell, Clerk.

43 State of Minnesota Supreme Court, October Term, A. D. 1911.

No. 14.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

Appeal from District Court, Fourth Judicial District, County of Hennepin.

This cause having been duly argued and submitted at the General October Term of this court, A. D. 1911, upon the return to the appeal herein,

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered November 9, A. D. 1911.

By the Court:

Attest:

I. A. CASWELL, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk*.

44 & 45 17128. State of Minnesota Supreme Court. Copy of Order for Judgment. Filed November 9, 1911. I. A. Caswell, Clerk.

46 State of Minnesota Supreme Court, October Term, A. D. 1911.

No. 14.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

Pursuant to an order of Court duly made and entered in this cause November 9, A. D. 1911—

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court of the Fourth Judicial District, sitting within and for the

County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Forty-two and 00/100 Dollars ($42.00), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 9, A. D. 1911.

By the Court:

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Cost allowed by statute	$25.00
Printer's fees	6.00
Clerk's fees, Supreme Court	11.00
Affidavits and Acknowledgments	.....
Return	.....
Postage and express	.....
Filing Mandate	.....
	$42.00

47 State of Minnesota Supreme Court. Transcript of Judgment. Filed November 9, 1911. I. A. Caswell, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, November 9, A. D. 1911.

[SEAL.] I. A. CASWELL, *Clerk.*

48 SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court at my office, in St. Paul, Minnesota, this 27th day of November, 1911.

[Seal of the Supreme Court State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

49 STATE OF MINNESOTA,

In Supreme Court, April Term, 1911.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.
vs.
CITY OF MINNEAPOLIS, Respondent.

Comes now the Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, and prays that a writ of error in the above entitled cause may issue to the Supreme Court of the State of Minnesota, to review a final judgment entered in said court on the 9th day of November, 1911, in favor of the City of Minneapolis, and against the Chicago, Milwaukee & St. Paul Railway Company, and the plaintiff in error assigns the following error in the rendition of said judgment:

The court erred in holding that in a condemnation proceeding instituted by the City of Minneapolis to acquire an easement across the right of way of the plaintiff in error for an artificial canal, the plaintiff in error is not entitled to have included in the award of its damages the cost of constructing a sufficient bridge to connect the parts of its land separated by said canal and to carry its road-bed and tracks over the same, contrary to the provisions of the Constitution of the State of Minnesota and that of the United States.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By F. W. ROOT, *Its Attorney.*

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the City of Minneapolis, respondent, and the Chicago, Milwaukee & St. Paul Railway Company, appellant, wherein was drawn in question the validity of an authority exercised under said State, on the ground of the same being repugnant to the Constitution of the United States, and the decision was in favor of its validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and

the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, a manifest error hath happened to the great damage of the said Chicago, Milwaukee & St. Paul Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, before the Judges of the Supreme Court of the United States, within thirty (30) days from the date hereof, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglas White, Chief
51 Justice of the Supreme Court of the United States, this 24th day of November, A. D. 1911.

LOUISE B. TROTT,
Clerk of the Circuit Court of the United States for the District of Minnesota.

[U. S. Circuit Court Seal, Dist. of Minnesota, Third Division.]

The above writ is allowed, bond in the sum of Five Hundred Dollars ($500.00) approved by this court, having been executed and filed.

Dated, November 24, 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

UNITED STATES OF AMERICA,
State of Minnesota, ss:

In obedience to the command of this writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

Witness my hand and official seal the 24th day of November, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk of the Supreme Court of the State of Minnesota.

51½ [Endorsed:] State of Minnesota. In Supreme Court. Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent. Petition and writ of error. Filed Nov. 24, 1911. I. A. Caswell, Clerk.

52 STATE OF MINNESOTA:

In Supreme Court, April Term, 1911.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,
vs.
CITY OF MINNEAPOLIS, Respondent.

Now comes the said appellant, the Chicago, Milwaukee & St. Paul Railway Company, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota, in the above entitled matter, there is manifest error in this, to-wit:

1. The court erred in holding, that in a condemnation proceeding to acquire an easement across the right-of-way of the Railway Company for an artificial canal, the Railway Company is not entitled to have included in the award of its damages the cost of constructing a sufficient bridge to connect the parts of its land separated by said canal and to carry its road bed and tracks over the same;

2. The court erred in holding that the rule applicable to crossings of railroads by streets and highways applies equally to crossings of railroads by artificial canals;

3. The court erred in holding that the city of Minneapolis has authority, under its mere police power, to take, destroy and damage the property of the Railway Company for the use of the public, without making compensation therefor;

4. The court erred in holding, that the taking of the property of the Railway Company, for such public use, does not constitute a taking, destruction or damage of private property for public use without just compensation, in violation of Sec. 13 of Article 1 of the Constitution of the State of Minnesota;

5. The court erred in holding, that the taking of the property of the Railway Company, for such public use, without compen-
53 sation for the cost of such bridge, does not constitute an abridgment of the privileges and immunities of the Railway Company as a citizen of the United States, does not constitute a deprivation of its property without due process of law, and does not deny to it equal protection of the laws, in violation of Sec. 1 of Article XIV of the Amendments to the Constitution of the United States.

6. The court erred in rendering judgment fixing the compensation which the city should pay to the Railway Company on account of, and as incident to the taking of said land, in any amount less than the full actual cost of the bridge required to carry the tracks of the Railway Company over the proposed canal, together with a sum sufficient to maintain said bridge, with Ten Dollars as the agreed value of the land added thereto.

Wherefore, the appellant prays a reversal of the said decision and judgment.

Dated, November 24, 1911.

F. W. ROOT,
Attorney for Appellant.

53½ [Endorsed:] State of Minnesota. In Supreme Court. Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent. Assignment of errors. Filed Nov. 24, 1911. I. A. Caswell, Clerk.

54 STATE OF MINNESOTA:

In Supreme Court, April Term, 1911.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,

vs.

CITY OF MINNEAPOLIS, Respondent.

Know All Men By These Presents, that we, Chicago, Milwaukee & St. Paul Railway Company, as principal, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are firmly bound unto the City of Minneapolis, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to said City of Minneapolis, its successors, representatives or assigns, to which payment well and truly to be made, the said principal binds itself, its successors and assigns, and the said surety binds itself, its successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of November, in the year of our Lord One Thousand Nine Hundred and Eleven.

Whereas, lately, in the Supreme Court of the State of Minnesota, in a suit pending in said court between City of Minneapolis, respondent, and Chicago, Milwaukee & St. Paul Railway Company, appellant, judgment was rendered against said appellant, and the said appellant having obtained a writ of error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment in the aforesaid cause, and the citation directed to the City of Minneapolis, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within thirty (30) days after the date thereof:

Now, the condition of the above obligation is such that if the said Chicago, Milwaukee & St. Paul Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation

55 to be void, otherwise to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By F. W. ROOT, [SEAL.]
Agent and Attorney.

Sealed & delivered in presence of
F. A. McFARLAND,
NELSON J. WILCOX.

UNITED STATES FIDELITY & GUARANTY COMPANY, BALTIMORE, MARYLAND,
By WIRT WILSON, AND
GEORGE E. MURPHY, [SEAL.]
Its Attorney in Fact.

H. K. CRABBE,
MAX. SUSSMAN.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 24th day of November, 1911, before me, a Notary Public within and for said County and State, personally appeared Wirt Wilson and George E. Murphy, to me personally known who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-fact of and for the United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal affixed and the said instrument was executed by authority of its Board of Directors; and the said Wirt Wilson and George E. Murphy did acknowledge that they executed the said instrument as the free act and deed of said Company.

[SEAL.] (Signed) BLANCHE W. SCALLEN,
Notary Public, Hennepin County, Minnesota.

My Commission expires Feb. 1st, 1910.

55½ [Endorsed:] State of Minnesota. In Supreme Court. Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent. Bond.

56 State of Minnesota in Supreme Court. Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent. Bond. Bond approved this 24th day of November, 1911. Chas. M. Start, Chief Justice of the Supreme Court of Minnesota. Filed Nov. 24, 1911. I. A. Caswell, Clerk.

57 SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on November 24, 1911, in the matter of the Chicago, Milwaukee & St. Paul Railway Company, Appellant, and City of Minneapolis, Respondent,

1. The original bond of which a copy is herein set forth.
2. One copy of the writ of error, as herein set forth, to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this November 27, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

58 STATE OF MINNESOTA:

In Supreme Court, April Term, 1911.

United States of America to the City of Minneapolis, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, in the District of Columbia, within thirty (30) days after the date hereof, pursuant to writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein the Chicago, Milwaukee & St. Paul Railway Company is plaintiff in error, and the City of Minneapolis is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness, the Honorable Charles M. Start, Chief Justice of the Supreme Court of Minnesota, this 24th day of November, 1911.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

Personal service of this instrument, and receipt of copy thereof, admitted at Minneapolis this 24th day of November, 1911.

C. J. ROCKWOOD,
Attorney for the City of Minneapolis, Respondent.

[Endorsed:] State of Minnesota. In Supreme Court. Chicago, Milwaukee & St. Paul Railway Company, Appellant, vs. City of Minneapolis, Respondent. Citation. Filed Nov. 24, 1911. I. A. Caswell, Clerk.

59 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, in the City of St. Paul, this November 27, 1911.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Endorsed on cover: File No. 22,982. Minnesota Supreme Court. Term No. 150. Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, vs. City of Minneapolis. Filed December 26th, 1911. File No. 22,982.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 150.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Plaintiff in Error,*

vs.

CITY OF MINNEAPOLIS, *Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT OF CASE.

This case comes here upon writ of error to the Supreme Court of the state of Minnesota. The case was submitted to the District Court of Hennepin county, Minnesota, upon an agreed statement of facts, pursuant to Sec. 4286 of the Rev. Laws of Minnesota of 1905. The District Court ordered judgment in favor of the defendant in error, there the plaintiff. From this judgment the plaintiff in error, there the defendant, appealed to the State Supreme Court, where judgment was affirmed.

STATEMENT OF FACTS.

The city of Minneapolis, defendant in error, having within its corporate limits certain lakes and having acquired the shores thereof for park and parkway purposes, acting through its Board of Park Commissioners, determined to connect Lake Calhoun and Lake of the Isles thereof, by an artificial canal, so that pleasure boats might pass from one lake to the other.

These lakes are about six hundred feet apart at their nearest approach.

Upon and through the isthmus of land separating these lakes plaintiff in error owns and operates a main line of railway, running from St. Paul and Minneapolis westward to the Missouri River, and thence to the Pacific Coast.

At the point where it was proposed to construct said canal, the railroad tracks were upon an artificial embankment about sixteen feet above the natural surface of the ground, and about eighteen feet above the level established for the surface of the water in said lakes and in the proposed canal, and the construction and maintenance of such canal necessitated the building of a bridge to carry the railway tracks over the same.

In lieu of condemnation proceedings, on the part of the city, to acquire an easement for said canal across said right of way, and to determine the respective rights and liabilities of the parties, it was agreed that the entire matter, and all questions involved therein, except as hereinafter stated, should

be submitted to the District Court of Hennepin county, under stipulation and agreed facts, pursuant to Section 4286 of the Revised Laws of 1905.

It was, however, agreed that the Railway Company should be awarded, as the value of the mere land taken, or the easement therein, the sum of ten dollars ($10.00).

It was also agreed that a bridge, constructed according to the city's plans, would cost about eighteen thousand, five hundred thirteen dollars ($18,513.00), of which two thousand, five hundred and forty-four ($2,544.00) should, in any event, be paid by the city as the cost of certain ornamental features desired by the city.

It was contended by the city that such sum of $2,544.00, added to the said sum of $10.00 as the agreed value of the land, was the extent of its liability.

It was contended by the Railway Company that it was entitled, not only to said sum of $10.00, but to the full actual cost of such bridge, as well as to such further sum as would suffice for its maintenance.

The District Court held that the Railway Company was entitled to recover $10.00, as the agreed value of the land taken, together with the sum of $2,544.00 representing the cost of the ornamental features of the bridge, and no more, whether as any part of the cost of the bridge, or for its future maintenance.

That court further held that the taking of the property of the Railway Company for the purpose

and in the manner in said stipulation stated, without other or greater compensation than as aforesaid, did not violate or tend to violate any provision of Section 13, of Article 1, of the Constitution of the state of Minnesota, and was not in violation of any provision of Section 1, of Article 14, of the Amendments to the Constitution of the United States.

The State Supreme Court affirmed the lower court, holding that the imposition upon the Railway Company of the uncompensated burden of constructing and maintaining the bridge in question, violated no provision of the Constitution of the United States.

ASSIGNMENT OF ERRORS.

The State Supreme Court erred:

1. In holding that the cost of the bridge required to carry the railway tracks over the canal, need not be included in the award of damages to the plaintiff in error, for the taking of a part of its right of way for canal purposes;

2. In holding, in violation of Article 5, of the Amendments to the Constitution of the United States, that such taking of the property of the plaintiff in error, without making full compensation sufficient to include not only the value of the land taken, but all resulting expense of the construction and maintenance of the bridge, did not constitute a taking of private property, for public use, without just compensation;

3. In holding, in violation of Section 1, of Article 14, of the Amendments to the Constitution of the United States, that the taking of the property of the plaintiff in error, without making such full compensation, did not deprive it of its property without due process of law, and did not deny to plaintiff in error the equal protection of the laws.

ARGUMENT.

It is without dispute that the Railway Company owns a 100-ft. right of way strip of land through the city of Minneapolis; that upon such strip it has certain railway tracks laid upon a 16-ft. embankment, over which tracks it is operating trains;

That the city seeks to take an easement 100 feet wide across said right of way, for the purpose of constructing and maintaining therein a canal for *pleasure boating*, connecting Lake Calhoun and Lake of the Isles, the level of whose waters is about 18 feet below the level of said railway tracks; that as an immediate and direct result of such taking an expensive bridge is required to carry the railway tracks over such canal.

It is indisputable that the cost of such bridge, if forced upon the Railway Company, will constitute a taking of its property.

The real question, then, is: Is this such a taking as, under the Constitution of the United States, entitles the property owner to compensation?

It is not claimed for the city that there is any special statutory provision of Minnesota excepting

this case from the general rule; but it is claimed that the taking here is an exercise of its Police Power, and that such power may be exercised without compensation for property taken or damaged.

The Railway Company contends, that cases of this character are ruled by one or the other of two distinct principles; namely, the right of "Eminent Domain," which implies a taking (and, under Minnesota Constitution, a damaging) by the sovereign for some public use, upon due compensation, or the "Police Power," which implies a regulation by the sovereign of private property, for the preservation or promotion of the public safety, health or general welfare.

Here, to acquire a right of way for a canal across the property of a railway company, the city invokes the right of Eminent Domain. In such proceeding the Railway Company must, under the Constitution, be awarded full compensation, including all damages directly or indirectly incident to such taking.

Bearing in mind that this is not a case where the city has already acquired an easement across the property of the Railway Company for canal purposes, and is, in a separate proceeding, seeking to compel the Railway Company to build a bridge to accommodate such canal; but that, on the contrary, it is an original proceeding on the part of the city, under the right of Eminent Domain, to acquire such easement, it would seem that the matter should not be difficult of a right conclusion.

We believe that it is the settled law of this court, that in a condemnation proceeding under the right of Eminent Domain, the property owner is entitled to full compensatory damages, which includes, not only the value of the property actually taken, but also all consequential damage to the remaining property. That the application of this rule in our case would include, as a proper element of damage, the cost of constructing the bridge, made necessary by the taking of the strip of land for canal purposes. And that a denial of damage for the cost of such bridge is a taking of the property of the Railway Company for public use without just compensation, in violation of both the Federal and State Constitutions.

In the instant case, we have no question of public health or safety, no question of danger to anyone. The mere fact that the strip of land taken from the Railway Company is to be used for a canal,—a water-way,—the surface of the waters of which will be 18 feet below the railway tracks, excludes consideration of a crossing of the tracks at grade. So no element of danger appeals to the Police Power.

A bridge is required, not to relieve the public from dangers incident to the crossing of railway tracks at grade, but because the land is to be used for a canal, leaving a gap in the railroad.

Under such physical conditions, a bridge would be required, even if the opening therein was to serve no purpose other than to connect the waters of the lakes.

It is, therefore, clear to us, that the state courts were led into error by their *failure* to *distinguish* between Eminent Domain and Police Power. The former is resorted to where private property is taken for a public use; the latter where the sovereign restricts and regulates or destroys private property in the public interest; where its exercise is necessary to protect the lives, health or property of the citizens. For such purposes of protection there need be no compensation.

The law of Eminent Domain furnishes the means and methods for acquisition of property. The Police Power is the fountain of authority, not to acquire, but to regulate or administer.

Eminent Domain implies a *taking* of private property by the sovereign for some public use, and Police Power implies a *regulation* by the sovereign of private property for preservation of the public safety, health and general welfare. The former, resting upon a public benefit, cannot, under the Constitution, be enjoyed by the public, except upon condition that full compensation for all damage to private property, taken or injured, shall be first paid or tendered. The latter, however, arises from a very different source. It springs from the fundamental principle that every property owner must so use his own as not to endanger the safety, health and general welfare of the community in which he lives. It extends to the protection of the lives, health and property of the citizens, and the preservation of good order and public morals. And all persons are subject thereto without any right to

indemnity accruing to one who suffers thereby.

The exercise of the one is conditioned generally on compensation to the owner and is founded on public utility. While the exercise of the other is generally based on disaster, fault or inevitable necessity. In the one case there is an *appropriation* of the property of the person or corporation, and in the other there is usually a *regulation*, sometimes a destruction thereof, but *no permanent exclusion of the owner.*

In the one case the owner has been guilty of no legal wrong, and his property may not be confiscated. The community must pay for the benefit it receives to his injury. In the other, he has created the very conditions which require the surrender of his property to insure the safety, health or general welfare of the community. Except in instances of property destroyed to arrest a conflagration, or of other imminent peril, he has usually been a wrongdoer, and the community merely uses its natural right of self preservation against him, and in such case the owner, though deprived of his property, has no just claim for damages.

There is nothing in our case to show that the connecting of these two lakes is a matter of such importance to the *general public*, a matter so vitally affecting the *general welfare* of the community, as to bring the enterprise within the principle of Police Power.

Each of these lakes was navigable for pleasure boats without a canal. The sole difference is that, with such connecting canal, the activities of the

boatman may be extended to include two lakes, instead of being confined to one.

How much will the *"health"* of such boatman *"be improved,"* how much his *"happiness"* increased, or his *"welfare promoted,"* by his having two lakes in which to paddle, instead of but one?

Can it be said that the favored few, who may be financially able to provide themselves with *"pleasure boats"* upon either lake, and who may have the time and desire to occasionally use this canal, constitute the *"general public"*?

To call into action, for a purpose and for results so unprecedented and insignificant, the imperial force of the Police Power, is to violate the sense of proportion as ludicrously as did the ancient fable labelled, *"Parturiunt Montes, Nascitur ridiculus Mus."*

Counsel for the city cannot reasonably contend that the proposed canal is in any way designed to secure the public safety, health or welfare, or that the opening of such canal would operate upon any existing evil that injuriously affects the safety, health, morals or general welfare of the community. Neither did the State Supreme Court so find. The sole basis for its decision is found at page 464 of the reported case, Vol. 115 Minnesota Reports, where the court uses the following language:

> "Such connecting water-way will enhance the usefulness of the lakes in affording opportunity to the public for recreation and pleasure. Such water-way will therefore directly tend to promote the *happiness* and *welfare* of the public."

We insist that the sole principle of law determinative of the question here under consideration is that of Eminent Domain. And this principle can, under written Constitutions, be exercised only upon condition that full compensation for all private property taken or injured shall be made.

We respectfully contend that the correct view of this matter was taken by the chief justice of the State Supreme Court in the following language of his dissenting opinion:

> "The taking of appellant's land for the canal will, for all practical purposes, divide it into two parts, and necessitate the construction of a bridge over the canal to connect the separated parts of its land, and thereby restore its roadbed to its original condition of safety and utility. The two lakes are not connected by any natural watercourse, except that at a point fifty-nine feet east of the center line of the proposed canal, where it will cross appellant's right of way, there is a small watercourse, the waters of which, coming from Lake of the Isles, are discharged into Lake Calhoun through a pipe three feet in diameter placed under the appellant's railroad bed. When the canal is constructed, this watercourse and pipe will be useless, and they can be closed.
>
> The question presented by the record is whether the appellant is entitled to have included, in the assessment of its damages for the taking and damaging of its properety, so taken for a public use, the necessary cost of constructing a bridge over the canal so as to connect the parts of its roadbed, divided by the canal. The contention of the city, which the court sustains, is that the appellant is not entitled to have included in its damages such cost, for the reason that public safety, convenience, and welfare require the construction

of the bridge; hence in the exercise of the police power the uncompensated duty of building the bridge may be imposed upon the appellant. It must be conceded that if the bridge in this case is a necessary safety device, to protect the public from the dangers arising from railway grade crossings over public ways, the uncompensated duty of constructing and maintaining it may, in the exercise of police power, be imposed upon the appellant. The question, however, is: Do the special facts of this case bring it within the rule stated? How can the bridge in any manner conserve the safety of the public in using the canal? There can, from the very nature of the case, be no grade crossing of a railroad and a canal. Nor can the construction of this bridge promote in any manner public convenience or welfare, for the sole necessity for and function of the bridge will be to connect the parts of the appellant's land which will be separated by the canal, and thereby restore the roadbed to its original condition of safety and utility.

The court in its opinion seem to attach much importance to the fact that there is to be a walk on each side of the canal. I am unable to understand how such fact can be regarded as specially weighty. The walks are a mere incident to the canal, and if the bridge is not essential as a safety device to the canal proper, it cannot be as to the walks on each side of it.

Again, the facts of this case do not present any question of the safety of navigation, or of a natural watercourse to be widened or deepened, or of the obstruction of navigable waters, or of public drainage. We have simply the question whether the state may, in the exercise of its police power, take dry land for the purpose of creating an artificial watercourse without any compensation except the mere value of the land taken. It is true that, when the right to convert such land into an

artificial watercourse is once secured by the exercise of the power of eminent domain and the payment of just compensation, the waters of the artificial course become public waters and the right of public navigation thereof paramount, but not before. In the very nature of the case the doctrine of the paramount right of public navigation cannot have any application to dry land in case the state seeks to take it by the exercise of the power of eminent domain, in order to convert it into an artificial watercourse. Any attempt to assess the appellant's damages for taking its land for the creation of an artificial watercourse, on the basis of rights and benefits which will accrue to the public after it has secured the right to take the land and convert it into a canal, would violate the plainest principles of natural justice.

I am, therefore, of the opinion that the uncompensated duty of constructing the bridge here in question cannot, upon the particular facts of this case, be imposed upon the appellant in the exercise of the police power of the state, and that the cost of the bridge ought to have been included in its damages. In reaching this conclusion I am not unmindful of the fact that the police power is an essential and beneficent attribute of sovereignty, the exercise of which, pursuant to valid legislative authority, cannot be controlled by the courts. But when, as is too often the case, such power is invoked to justify the confiscation of private propety for public use in violation of constitutional guaranties, the courts may and must interfere for the protection of the citizens' constitutional rights. The police power cannot be used as a mask for removing private property from the protection of the Constitution."

The State Supreme Court in the majority opinion cites, among others, the *Drainage Commissioners case,* 200 U. S. 561, as authority for its holding

in the present case. That, we think, is a border line decision, even as confined to the facts of that case, and is inapplicable to the wholly different facts of our case.

In the *Drainage case*, on page 586, this court, quoting from the Illinois Supreme Court, says (the itallics being ours):

> "The right of *drainage* through a *natural* watercourse or a *natural* waterway is a *natural* easement appurtenant to the land of every individual through whose land such *natural* watercourse runs, and every owner of land along such watercourse is obliged to take notice of the *natural* easement possessed by other owners along the same watercourse." Again, in the same case: "Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained, and in the absence of any constitutional provision in relation to such laws they have been sustained, upon high authority, as the exercise of the police power." Further: "A *natural* watercourse being a *natural* easement, is placed upon the same ground, in many respects as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a *natural* watercourse or a public highway, such highway or railroad must be so constructed across the existing highway or waterway, and so maintained, that said highway or waterway, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time.
>
> * * * The great weight of authority is, that where there is a *natural* waterway, or where a highway already exists and is crossed by a railroad company under its general

> license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand." The court said that the implied authority of the company to build its present bridge was coupled with its common law duty "to build its bridge over the *natural* watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to *regulate* its use."

In the case at bar the canal is purely *artificial* and its sole purpose, as found by tht State Supreme Court, is to *"enhance the usefulness of the lakes* (connected thereby), *in affording opportunity to the public for recreation and pleasure."*

It is true that this court has said that railway companies must bear the burden of the expense of separating street and railroad grades, when made necessary for the *safety of the public,* even to the extent of the bridges thereby made necessary; and that it makes no difference whether the particular street is laid out *before* or *after* the railroad. In this regard the court has said, that a railroad company accepts its franchise from the state subject, necessarily, to the condition that it will conform, at its own expense, to any *regulation, not arbitrary* in its character, as to the opening or use of streets, which has for its object the *safety* of the public, etc.; that the power, whether called, police, govern-

mental or legislative, exists in each state by appropriate enactments *not forbidden by its own constitution or the Constitution of the United States,* to *regulate* the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.

But in so saying the court evoked no new principle of law. It was but another way of stating the long established rule, that every property owner must so use his own as not to endanger the safety, health and general welfare of the community in which he lives. And this rule is not confined to corporations, but, as above quoted, includes "all persons and corporations" alike.

In using the foregoing language, it cannot be that the court meant that a railway company, in accepting a franchise to acquire and hold property for railroad purposes within the state, holds such property subject to the right of confiscation by the state at any time. If the whole may not be confiscated, no part may be.

No one will contend that a railway company, under such circumstances, is not subject to every reasonable rule or regulation that the state may promulgate, which has for its purpose better service, fairer rates and safety for passengers, and employes, as well as to persons lawfully crossing its tracks. And the latter would include every variety of safety device found reasonable and necessary.

But it is too much to say that the state retains the right to require the railway company to *donate*

any part of its property in aid of the construction of an artificial canal, the sole reason for which is that it will afford opportunity to an occasional member of the public for mere *recreation* and *pleasure*.

Public parks are wisely created for public recreation, amusement, pleasure. But what public park in these United States was ever yet created out of property of private citizens, wrested from them without compensation, under guise,—no, not under guise, but under pretext of a legitimate exercise of Police Power? And with reference to generality of use, what comparison can be made between the travel through this little canal and the resort of throngs to any park worthy of the name?

If the land lying between these two lakes were owned by a private individual, and over it, upon an artificial embankment, were a private driveway leading to his residence; and if proceedings were instituted to acquire a right of way for an artificial canal through such private driveway, no court would deny to such individual full compensation, not only for the land taken, but for all the expense required to restore such driveway, including all necessary bridging.

None but a pronounced Socialist would deny that, to put upon such a property owner the expense of bridging, would constitute a taking of his property without due compensation. A Russian Jew might class it as a fair illustration of Russian Police Power.

Counsel for the city will be unable to cite the

court to any respectable case which applies the doctrine of Police Power to the acquisition of private property, to the compulsory outlay of private funds, not to the avoidance or correction of something injurious to the community, but to the provision of some mere pleasure to either the few or the many.

Here the Railway Company has thus far been required to expend $15,969.00 in original construction, and an unknown future amount must be expended in future maintenance,—*for what?* Merely to provide an occasional amorous couple with temptation to prolong their fondlings, perhaps their courtship, by passing from the wearisomeness of one lake into the scenery of another.

Is this a fit emergency, or crying call, to invoke the irresponsible exercise of the sovereign authority of constitutional government, to raid the funds of even a railroad company?

Whatever may be said by counsel for the city to the contrary, we most earnestly contend that the holding of the State Supreme Court in this case is without support of any decision of this court.

In the *Duluth case,* 208 U. S. 583, and the *City of Connersville case,* 218 U. S. 336, the question was whether the Railway Company or the city should bear the expense of a bridge at a point of intersection of railway and street.

It was said, in the *Duluth case,* that the exercise of the Police Power in the interest of *public health* and *safety* is to be maintained unhampered; that

uncompensated obedience to an ordinance passed in its exercise is not violative of property protected by the Federal Constitution. The question there was one of *public safety*. And the court further said, page 594:

> "When the railroad company accepted its charter it received its franchise subject to the authority and power of the state to impose such reasonable *regulations* concerning the use in matters affecting the common *safety* of its *dangerous* enginery," etc.

And further, page 594:

> "The fallacy involved in the claim of the relator and, as we think, in some decisions by which its claim is supported, arises from a *failure* to *distinguish* between rights of property, which confessedly are protected under the constitution from being divested or appropriated without compensation, and the very different matter concerning the *manner* in which the owner may use his property so as *not to* unnecessarily *endanger* the public."

In the *Connersville case* the decision of the State Supreme Court, 83 N. E. 503, was founded upon a state law, which was in effect when the Railway Company accepted its franchise, and which granted the right to every railway company to construct its road across any highway, but so as *not to interfere with the free use* of the same, and in such manner as to afford *security* for life and property. The statute further provided that such railroad company should *restore* the highway thus intersected to its *former state*, or in a sufficient manner not to unnecessarily impair its usefulness.

This court, in affirming the State Court, on page 344, said:

> "The railway company accepted its franchise from the state subject, necessarily, to the condition that it would conform, at its own expense, to any regulations *not arbitrary* in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted."

In our case there is no question of *public safety,* nor is there any *state law affecting* our question.

We have heretofore referred to the *Chicago Drainage Commissioners case,* 200 U. S. 561, which is clearly distinguished from our case.

Briefly speaking, there the railway company, in constructing its line, had carried its tracks upon a bridge over Rob Roy Creek, a natural watercouse, which the drainage commissioners sought to widen for *general drainage* and *sanitary purposes,* necessitating the lengthening or rebuilding of the railway bridge.

Among other thnigs, this court, on page 588 of that case, say:

> "It has been so often said, that it need only be adverted to here, that corporations, such as appellant, do not hold their property and exercise their franchise strictly in a private right, but that from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation, though with their

grant of power to traverse the state with their lines of railroad it cannot be said that their right of private property attaches to every highway and watercourse over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the state, obstacles to its progress and a menace to its general welfare * * *. Of course, in the exercise of the right of public interest, as against such corporations, the demand must be *reasonable* and must clearly appear to be for the *public welfare.*"

Again, on page 592:

"And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon *the circumstances of each case* and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate *public* purpose. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare."

Much less, say we, when relating to the casual pleasure of the few.

And again, on page 593:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such case is beyond all doubt."

Contrast the holding of the State Supreme Court in our case with the sedulous care exhibited by that court, for the property of the individual citizen since the amendment to the State Constitution, which forbids *damage* to private property without compensation.

In *Sallden v. City of Little Falls*, 102 Minn. 358, a lot owner on a paper street, never before graded, was held entitled to damages caused only by establishment of a street grade above the natural level of his lot.

There the street grade was attempted by virtue of the Police Power of the city. The decision in effect says, that though the Police Power exists, it must, in such a case, be exercised in conformity to the constitutional limits of the other sovereign power of Eminent Domain. Yet, travel in the graded street, must doubtless have been more agreeable, than over the same land in a rough state.

If government ownership of railroads is intended, better that the properties be taken in their entirety, upon proper compensation, rather than by piecemeal filching under color of police regulation.

Receiving no benefit, the Railway Company is here charged with over $15,000.00 of the first cost of constructing a bridge, besides the full cost of future maintenance, solely to accommodate an artificial canal to be used only for *"recreation* and *pleasure."*

It is difficult to conceive how this can be looked upon as *"the equal protection of the laws."*

The judgment herein complained of should be reversed.

Respectfully submitted,

F. W. ROOT,

Attorney for Plaintiff in Error.

BURTON HANSON,

Of Counsel for Plaintiff in Error.

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Smart v. Aroostook Lumber Co. (103 Me. 37; 68 Atl. 527; 14 L. R. A. (N. S.) 1083) 11
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State ex rel. Lyon v. Columbia Water Power Co. (82 S. C. 181) 12
State, ex rel., City of Duluth v. Northern Pacific Railway Co. (98 Minn. 429; 108 N. W. 269) 7, 8
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Minnesota and Pacific Railroad Co. (98 Minn. 536; 108 N. W. 822) 7
State of Minnesota, ex rel., City of Minneapolis v. St. Paul, Minneapolis & Manitoba Railway Co. (35 Minn. 131; 28 N. W. 3; 59 Am. Rep. 313) 7
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State, ex rel., City of Minneapolis v. St. Paul, Minneapolis & Manitoba Railway Company (98 Minn. 380; 108 N. W. 261; 8 Ann. Cas. 1047; 29 L. R. A. (N. S.) 298) 7, 9, 21
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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 150.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Plaintiff in Error,*

vs.

CITY OF MINNEAPOLIS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA, TO REVIEW 115 MINN. 460.

Brief for Defendant in Error.

This case was submitted to the District Court upon an agreed statement of facts, for the purpose of determining the compensation to which the Railway Company was entitled for taking an easement crossing the right of way of the Railway Company for the purpose of a public canal. The agreed statement is found on pages 3 to 7 of the printed record and is repeated in substance in the opinion of the Supreme Court on pages 9 to 11. It may serve the convenience of the court to repeat here the statement in the form given to it by the Supreme Court. There is nothing to add and it is impos-

sible to improve. This statement also formulates the questions of law which are involved:

> "Within the corporate limits of the city of Minneapolis, the respondent herein, are three meandered lakes—Lake Calhoun, having an area of 460 acres; Lake of the Isles, having an area of 107 acres; and Cedar Lake, having an area of 150 acres. Each of these lakes is adapted for use by the public for pleasure boating, ice boating, skating and other like uses, and is actually used by the public for such purposes. The city of Minneapolis has acquired, for park and parkway purposes, all the lands constituting the shores of Lake Calhoun and Lake of the Isles, as well as a portion of the shores of Cedar Lake; also large tracts of land located near to said lakes, and such lands are used for park and parkway purposes. The city of Minneapolis has determined to construct, and is now constructing, two canals for public use, one connecting Cedar Lake with Lake of the Isles, and one connecting the Lake of the Isles with Lake Calhoun. The construction of such canals will greatly enhance the usefulness of said lakes to the public for pleasure boating, ice boating, skating and like purposes. Lake Calhoun and Lake of the Isles are separated by a narrow strip of land of varying width, at its narrowest point some 600 feet wide. The natural surface of this strip of land where the canal is being constructed is about two feet above the level at which the waters are maintained in Lake of the Isles and Lake Calhoun. There is between these two lakes a small natural water course in which water flows from Lake of the Isles to Lake Calhoun.
>
> "The appellant Railway Company is the owner of a right of way, a strip of land 100 feet in width, extending lengthwise along and near the center of the land between Lake Calhoun and Lake of the Isles. Along this right

of way the appellant, long before any steps were taken by the respondent city to construct the proposed improvement had constructed an embankment which, at the point where the canal will intersect it, is about 16 feet in height above the surface of the ground, and about 18 feet in height above the established surface of the water in the lakes and in the proposed canal. Upon the surface of this embankment the company laid its rails and has operated and still operates a commercial railway over and along its said right of way.

"To enable it to construct the proposed improvement, consisting of a waterway or canal with the walks upon either side thereof, the city seeks to condemn and take an easement in a strip of land 100 feet wide, extending across the right of way of the appellant. The taking of this land is for a public purpose and the city's right to so acquire this strip is conceded by the appellant railway company for the purposes of this appeal. The location of the proposed canal at the point where it crosses the railway tracks is immediately west of the natural water course between Lake Calhoun and Lake of the Isles, the center line of the proposed canal being 59 feet west of the point where the waters flowing in such natural course are carried through the embankment of the Railway Company in a pipe about three feet in diameter. The canal, when constructed, will take the place of and permit the closing of this natural channel.

"The construction and maintenance of the waterway and walks through the embankment of the Railway Company will necessitate the construction of a bridge to carry the railway tracks over the same. The agreed value of the strip of land 100 feet wide taken from the appellant for the public way is $10, and the cost of the construction of an adequate bridge over the canal and walks is $15,969. To such cost of the bridge is added, for purely ornamental

features contained in the plans adopted by the parties hereto, the sum of $2,544. This added cost for ornamental features is assumed by the city. By further agreement of the parties, the city is authorized to take the land involved and construct the proposed improvement. The Railway Company is to construct the bridge as planned, waiving no claim, however, for damages or compensation to which it is entitled under the law by virtue of such taking as in condemnation proceedings, and the city is obligated to pay all such damages and compensation. Upon trial of the matters so submitted, the court, upon the admitted facts, assessed the appellant's compensation for the taking and damaging of its property for the construction and operation of the public way, in the sum of $2,554, being $10, the value of the land taken, and $2,544, the cost of the ornamental features of the bridge, and disallowed the Railway Company's claim for the cost of constructing an adequate bridge.

"By its appeal the Railway Company presents for consideration and decision, the question whether it is entitled to have included in the assessment of its damages for the taking and injuring of its property for a public use, the cost of constructing a sufficient bridge made necessary by such use. The contention of the appellant is that the taking of its property for this public use, without making compensation including not only the value of the land taken but as well the resulting expense of the construction and maintenance of a bridge, will be a taking, destruction and damaging of private property for public use without just compensation, in violation of Sec. 13, Art. 1, Const. of Minn., and will constitute as well a violation of the 14th Amendment to the Constitution of the United States. This contention is based on the claim that the bridge is made necessary solely through the exercise of the right of eminent domain by the city, and

> that—because no question of safety of the crossing of the railway tracks and the public way is involved—the Railway Company cannot be required, by an exercise of the police power, to bear the uncompensated burden of building the bridge."

The discussion by Judge Simpson, of the Minnesota Supreme Court, which is found on pages 11 to 18 of the record, is so clear and complete and the authorities cited are so directly in point, that there is almost nothing to add. I might with the fullest confidence submit the case upon the record. My own comments will at least have the merit of brevity.

RAILWAY COMPANIES MUST ADAPT THEIR TRACKS TO THE PUBLIC CONVENIENCE.

It is implied in every grant of power to a railway company or other public service corporation, that it shall so construct its works and from time to time so modify their construction as to permit the communities affected not only to be exempt from the peculiar perils of railroad and other dangerous operations, but also to have and enjoy those means of communication which are necessary to community convenience and community welfare. And when changes in the construction or in method of operation become necessary to the community welfare and convenience, the companies must take them at their own cost. Railroads are of necessity permitted to cross other public ways, such as high-

ways, streets, rivers, drainage ditches and canals; and reciprocally railroad companies must, in the course of community growth and development, freely permit new and artificial crossings of their rights of way. The organized community, that is, the state, through its legislature, may in either case impose the burden of the expense upon the public or upon the company or divide it between the two. In the absence of such legislation, the common law, which deems the safety and the convenience of the community as a whole of more importance than the economies of the railroad company, imposes the duty and the expense upon the company. Priority in time is not an important circumstance. As a corollary, compensation to a railway company in eminent domain proceedings need not include the resultant expense of adapting the company's tracks to the changed conditions.

These doctrines have been applied in a great variety of cases by courts of almost all the states. And when so applied and brought to the bar of the Federal Supreme Court for re-examination, they have uniformly been sustained. They are merely one expression of the police power, which, simply stated, is the power to subordinate the individual interest to the community interest in matters of high importance.

I shall attempt no more than to catalogue the decisions which declare and apply the rules.

CASES IMPOSING ON RAILWAYS THE DUTY OF SEPARATING GRADES, OR ADOPTING OTHER SAFETY DEVICES, AT THEIR OWN EXPENSE.

MINNESOTA CASES.

State ex rel. City of Minneapolis v. St. Paul, Minneapolis and Manitoba Ry. Co., 35 Minn. 131.

State ex rel. City of Minneapolis v. Minneapolis and St. Louis Ry. Co., 39 Minn. 219.

State ex rel. St. P., M. & M. Ry. Co. v. District Court, 42 Minn. 247.

State ex rel. Minneapolis v. St. P., M. & M. Ry. Co., 98 Minn. 380.

Same case, affirmed, 214 U. S. 498.

State ex rel. Duluth v. N. P. Ry. Co., 98 Minn. 429.

Same case, affirmed, 208 U. S. 583.

State ex rel. Faribault v. W., M. & P. Ry. Co., 98 Minn. 536.

Minneapolis v. Minneapolis St. Ry. Co., 115 Minn. 514.

Twin City Separator Co. v. C., M. & St. P. R. Co., 118 Minn. 491.

FEDERAL SUPREME COURT CASES.

N. Y. & N. E. R. Co. v. Bristol, 151 U. S. 556.

C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 226.

Detroit F. W. & B. I. R. Co. v. Osborn, 189 U. S. 383.

Northern P. R. Co. v. Minnesota, 208 U. S. 583. Affirming 98 Minn. 429.

St. P., M. & M. Co. v. Minnesota, 214 U. S. 498; affirming 98 Minn. 380.

CASES IN OTHER STATES.

St. L. & S. F. R. Co. v. Fayetteville, 75 Ark. 534.

Woodruff v. Catlin, 54 Conn. 277.

Cleveland v. City Council, 102 Ga. 233.

C. & N. W. R. Co. v. Chicago, 140 Ill. 309.

C., B. & Q. R. Co. v. Chicago, 149 Ill. 457. Affirmed, 166 U. S. 226.

Lake Erie & W. R. Co. v. Shelley, 163 Ind. 36.

C. & I. W. R. Co. v. Connersville, 170 Ind. 316.

N. Y. C. & St. L. R. Co. v. Rhodes, 171 Ind. 521.

Boston v. County Com'rs, 79 Me. 386.

C., B. & Q. R. Co. v. State, 47 Neb. 549.

Ry. Co. v. Sharpe, 38 O. St. 150.

Thorpe v. Rutland, Etc., R. Co., 27 Vt. 140.

C., M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418.

AS A NECESSARY COROLLARY, THE MEASURE OF DAMAGES, IN THE ABSENCE OF A STATUTE ON THE SUBJECT, IN TAKING AN EASEMENT FOR THE CROSSING OF A RAILWAY FOR HIGHWAY PURPOSES, DOES NOT INCLUDE THE COST OF BRIDGES AND OTHER SAFETY DEVICES.

State v. District Court, 42 Minn. 247.

C., B. & Q. Ry. Co. v. Chicago, 149 Ill. 457. Affirmed in 166 U. S. 226.

C., I. & W. Ry. Co. v. Connersville, 170 Ind. 316. Affirmed in 218 U. S. 336.

St. L. & S. F. R. Co. v. Fayetteville, 75 Ark. 534.

C. & N. W. R. Co. v. Chicago, 140 Ill. 309.

Lake E. & W. Ry. Co. v. Shelley, 163 Ind. 36.

N. Y. & C. Ry. Co. v. Rhodes, 171 Ind. 521.

Mason City & Ft. D. R. Co. v. Supervisors, 144 Ia. 10.

L. & N. R. Co. v. Louisville (Ky.), 114 S. W. 743.

Albany N. R. Co. v. Brownell, 24 N. Y. 345.

People v. N. Y. C. & H. R. R. Co., 156 N. Y. 570.

Lehigh V. R. Co. v. Canal Board, 204 N. Y. 476.

So. K. R. Co. v. Oklahoma, 12 Okla. 82.

THE RIGHT OF THE PUBLIC TO CONVENIENT CROSSINGS AND THE DUTY OF PROTECTION TO THE PUBLIC EXIST AT COMMON LAW.

State ex rel. City v. St. P., M. & M. R. Co., 98 Minn. 380-400.

Chicago & E. R. Co. v. Luddington, 175 Ind. 35.

Pittsburgh C. C. & St. L. Co. v. Gregg, 102 N. E. 691 (Ind.)

In 98 Minn. at page 402, the court says:

"The right of the state to lay out and open new streets is a condition attached by implication of law to the charter and franchise of a railroad company, and the obligation to main-

tain the street intersections in good repair is a continuing one, follows the franchise, and applies to new streets or highways as soon as they come into existence."

The Indiana court court says in *R. Co. v. Luddington*:

> "It is settled law in this state that it is the duty of railroads which cross a highway or water course to restore the same to its former condition of usefulness and safety, even in the absence of any statutory requirement."

THE SAME RULE APPLIES TO WATERWAYS, NATURAL, AND ARTIFICIAL.

C., B. & Q. R. Co. v. Illinois, 200 U. S. 561.

West Chicago St. Ry. Co. v. People, 201 U. S. 506, affirming 214 Ill. 9.

Union Bridge Co. v. U. S., 204 U. S. 364.

C., B. & Q. R. Co. v. Board of Sup., 182 Fed. 291.

C. & E. R. Co. v. Luddington, 175 Ind. 35.

Mason City, Etc., R. Co. v. Supervisors, 144 Ia. 10.

Lehigh V. R. Co. v. Canal Board, 204 N. Y. 476.

The case cited from 204 N. Y. 476 is peculiarly apposite. The Canal Board, in the enlargement of the Erie Canal, determined to use a portion of the bed of Seneca River, which had never been navigable for steam or sail boats. The railway company in 1871 built, and in 1888 rebuilt, its bridge. The canal plans required that this bridge be raised 7.8 feet and that certain abutments be removed. This

necessitated a new bridge. The statute required the Canal Board to build the bridge. The attorney general contended on the one hand that the statute was void, because in its absence the burden would fall on the company and the legislature was restricted by the state constitution, in a provision forbidding gifts to any corporation or private undertaking. The company, on the other hand, contended for indemnity against loss from inconvenience as well as for construction of the bridge by the Canal Board. The lower court found for the company on both points. The Court of Appeals modified the judgment so as to require the Canal Board to build the bridge, but not to bear the consequent losses of the company, holding that the legislature had the power to distribute the burden at its discretion, and put part or all on the state, and part or all on the company. The court held that the will of the legislature was final and followed it.

LANDS AND WATERS RESERVED FOR THE RECREATION OF THE PEOPLE ARE DEVOTED TO A PUBLIC USE; A USE AS FULLY ENTITLED AS ANY OTHER TO THE PROTECTION OF THE LAW.

Lamprey v. State, 52 Minn. 181.

State Park Commissioners v. Henry, 38 Minn. 266.

Shoemaker v. U. S., 147 U. S. 282.

Smart v. Aroostook L. Co., 103 Me. 37.

Attorney General v. Woods, 108 Mass. 436.

Attorney General v. Williams, 174 Mass. 476.

Grand Rapids v. Powers, 89 Mich. 94.

People v. Adirondack R. Co., 160 N. Y. 248. Affirmed 176 U. S. 335.

In re City of New York, 167 N. Y. 624, affirming 57 App. Div. 166.

State ex rel. Lyon v. Columbia W. P. Co., 82 S. C. 181.

Madson v. Spokane V. L. & W. Co., 40 Wash. 414.

"We are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common law rule."

Lamprey v. State, 52 Minn. 181.

"Its navigability, even for pleasure, is as sacred in the eye of the law as its navigability for any other purpose."

Grand Rapids v. Powers, 89 Mich. 94.

"In this state recreation is assuming features and incidents as valuable to the public as trade and manufacturing."

Smart v. Aroostook L. Co., 103 Me. 37.

"In view of the great and growing importance to the public of the diversion of boating, there is a tendency, in modern judicial thought, to hold water to be navigable which is of such a nature and so situated as to be of general use for pleasure boating, though not useful for commercial purposes."

State ex rel. Lyon v. Columbia L. & W. Co., 82 S. C. 181.

In view of the establishment by cities and states, as well as by the nation, of parks and reserves of land and water in increasing numbers and in case of the nation of magnificent extent, and in view

of the countless throngs of people, especially in and near the great cities, who there find freedom, brief though it be, from the oppressions of urban existence, it would require sheer audacity to question the public character and use of these open spaces.

Nearly every large city now has some feature of its park system in which it takes especial pride. New York has its Central, Riverside and Bronx; Chicago its Lincoln, Grant and Jackson water fronts; Baltimore its Druid Hill; St. Louis its Forest Hill; San Francisco its Golden Gate; Wash ington its Rock Creek, Mall, and countless others; Detroit its Belle Isle; Boston its city and metropolitan systems on such a scale that scores of single features of marvelous beauty lose their identity in one matchless whole; and this is only a small part of the list. But not one of them has a possession or combination of possessions more unique than the group of crystal blue lakes within the bounds of the city of Minneapolis. Thirty thousand people, or one-tenth of the entire population of the city, is not a high estimate of the numbers who now and again on a single day find rest on, and in, and along the banks of the four lakes, three of which are described in this record.

The agreed facts are (page 4):

> "Within the corporate limits of said city are three meandered lakes, to-wit: Lake Calhoun, having an area of about 460 acres; Lake of the Isles, having an area of about 107 acres, and Cedar Lake, having an area of about 150 acres, each of said lakes is adapted for use by the public for pleasure boating, ice boating, skat-

ing and other like uses, and is actually used by the public for such purposes.

The city of Minneapolis has acquired for park and parkway purposes, in pursuance of chapter 30 of the Special Laws of Minnesota for 1889 and Acts Amendatory thereof and Supplementary thereto all the lands constituting the shores of Lake Calhoun and Lake of the Isles as well as the southerly and westerly shores of Cedar Lake, also large tracts of land located near to said several lakes; all of which have been acquired and are actually used for park and parkway purposes for the use and benefit of the inhabitants of the said city and the public. A map marked 'Exhibit A' is hereto attached and made a part of this statement showing said lakes in their location with reference to one another as well as lands in the vicinity of said lakes which have been acquired by the city of Minneapolis for the purposes aforesaid; which lands so acquired are colored green on said map.

The said Board of Park Commissioners of the city of Minneapolis has determined for and in behalf of the city to construct and is now constructing, two canals for such public use, one connecting Cedar Lake with the Lake of the Isles and one which, when completed, will connect Lake of the Isles and Lake Calhoun.

The construction of such canals will greatly enhance the usefulness of said lakes to the public for the purposes aforesaid."

The highest court of the state, in the judgment now under review, has declared (page 11):

"In considering the question thus presented there is no difficulty in determining the nature of the way here involved established by the city between the lakes and between the surrounding parks and parkways. Such nature clearly appears from the stated facts. Lake Calhoun and Lake of the Isles are public navigable waters, and the proposed waterway con-

necting them will, when established, be a public navigable waterway. Such connecting waterway will enhance the usefulness of the lakes in affording opportunity to the public for recreation and pleasure. Such waterway will thereby directly tend to promote the health, happiness and welfare of the public. When this waterway is established, the fact that it is artificial does not distinguish it as to the law applicable thereto from a natural water course. Nor does it differ in nature and applicable rules from a landway. The landway, like this waterway, is artificial, laid out and established to meet the public need and promote the general welfare.

The proposed way has on each side walks, and the bridge in question in part is necessary to permit the establishment and use of these walks crossing the tracks. By the concession of the right of the city to condemn the railway's property for this use, the reasonable necessity and convenience to the public of these foot-ways as well as of the waterway is admitted for the purposes of this appeal.

Nor does the fact that the waterway and walks will be used in connection with the lakes and parkway for pleasure and recreation distinguish, as to the legal principles applicable, this way from a road or canal devoted to the movement of goods or other commercial purposes. The desirability of conserving, extending and maintaining reasonable opportunities for wholesome public recreation is continually gaining in general recognition, because such opportunities and the use thereof concededly tend to promote the general health and welfare of the people."

LAND CASES AND WATER CASES ALIKE IN PRINCIPLE.

The view that one public highway is unlike another in respect of the law is hard to understand.

If a water way is to be discriminated against because artificial, every land highway must go into the same class. There is no such thing as a natural land highway. On the contrary, there are natural water highways, and the law of every nation has been careful of their preservation. And that water highways, created sometimes at enormous expense by the hand of man, are, when created, on a parity with natural waterways, is shown in a long line of cases in this court cited and culminating in *Perry v. Haines,* 191 U. S. 17.

The Erie Canal, the Panama Canal, and the tiny canal connecting Lake of the Isles with Lake Calhoun, all partake of the character of the waters whose navigation they extend. So it is expressly held in *Perry v. Haines, supra,* with reference to the Erie Canal. This canal, although in itself lying wholly within the bounds of its proprietary state, is navigable water of the United States, because at each end it connects with waters of that character and carries their commerce.

The dissenting opinion.

The argument of Chief Justice Start in his dissent (page 18) is in substance precisely that of Mr. Justice Brewer in *Chicago, Burlington & Quincy Railroad Co. v. Illinois,* 200 U. S. 561, and of Judge Sanborn in *Chicago, Burlington & Quincy Railroad Co. v. Supervisors,* 182 Fed. 291, both minority opinions. It is the argument which failed in the long list of cases already cited, and which has found

expression but seldom in court opinions even of the minority. The prevailing doctrine had unanimous support in the *Bristol case*, 151 U. S. 556, as well as in the leading *Minnesota cases*, 35 Minn. 131, and 98 Minn. 380, and in this court in 208 U. S. 583, and 218 U. S. 336. And Judge Start himself pronounced the unanimous judgment of the court in a case involving the same principles, a few weeks after the decision of the instant case.

City of Minneapolis v. Minneapolis Street Railway Co., 115 Minn. 514.

THE ARGUMENT FOR THE RAILWAY COMPANY.

The very able counsel whom I oppose have condensed their argument into the following propositions, which I think correctly represent the whole:

1. "A bridge is required, not to relieve the public from dangers incident to the crossing of railway tracks at grade, but because the land is to be used for a canal, leaving a gap in the railroad" (p. 7).

2. "But it is too much to say that the state retains the right to require the railway company to *donate* any part of its property in aid of the construction of an artificial canal, the sole reason of which is that it will afford opportunity to an occasional member of the public for mere *recreation* and *pleasure*" (pp. 16, 17).

3. "Nor is there any *state law affecting* our question" (p. 20).

Replying to these, *seriatim*:

1. Bridges and other safety devices at new crossings are never occasioned by past dangers, but by *anticipated* dangers. In case of railroads experi-

ment is not necessary. The dangers are known and every legislature, court, company and individual takes notice of them in advance. The law statutory and common requires the operating company to foresee and guard against them at its own expense. *State ex rel. District Court,* 42 Minn. 247.

Such statutes as the safety appliance acts of Congress apply to new railroads the moment they come into existence and in advance of the actual operation of trains. It is as legitimate to anticipate and prevent danger as to discover and remove existing danger.

In respect of cutting the company's tracks and thereby rendering a bridge necessary to reconnect them, the case is not in the least unlike any of the drainage or canal cases already cited, p. 9 of this brief. Nor is it unlike the cutting of a highway through the railway embankment in the *Connersville case,* 170 Ind. 316, 218 U. S. 336. And the instant case involves a land crossing as well as a water crossing. (Par. 7, Agreed Statement, p. 4 of Record.)

2. The point or points in the second quotation from brief of counsel find answer in the agreed statement. "Each of said lakes is adapted for use by the public for pleasure boating, ice boating, skating and other like uses, and is actually used by the public for such purposes" (p. 5 of Record).

"The construction of such canals will GREATLY *enhance the usefulness of said lakes to the public for the purposes aforesaid*" (p. 4 of Record).

The lakes are already connected by a small water course and the canal "will render the said water course and pipe useless and permit ito be closed" (p. 4).

"The agreed value of the mere land so proposed to be taken, irrespective of the cost of construction of such bridge, is the sum of ten ($10) dollars" (p. 5 of Record).

"Solely for the purposes of this proceeding the railway company waives any question of authority in the city to take an easement in the said land for the purpose aforesaid by proceedings in Eminent Domain, and for these purposes only concedes such authority in said city" (p. 6 of Record).

These are the solemn words in which the railway company presents its case to the court, and these are the words by which its case will be weighed rather than the belittling sarcasm of a brief or of oral argument. "Will greatly enhance the usefulness of said land to the public," and "the agreed value of the mere land * * * is ten dollars" are the phrases used in the agreed statement.

The formal admission of power to condemn is, in itself, implied admission that the purpose is public, that the use of public funds therefor is legitimate, and that the public welfare and convenience will be promoted. These justify the exercise of the police power.

C., B. & Q. R. Co. v. Illinois, 200 U. S. 561.

That pleasure and recreation of the public is a legitimate care of government has been declared also by this court.

Shoemaker v. U. S., 147 U. S. 282.

As a possible balance to the raillery of counsel, I venture one more quotation, this time from the supreme judicial court of Massachusetts:

> "It is also denied that the stream is navigable, although it is about two feet deep at low water, because it is not proved to be used for the purposes of navigation except with pleasure boats. The case of *Rowe v. Granite Bridge Co.*, 21 Pick. 344, 347, is cited to sustain this position. Chief Justice Shaw there says: 'It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character it must be navigable to some purpose useful to trade or agriculture.' The same thing, in substance, is stated in *Charlestown v. County Commissioners*, 3 Met. 202, and *Murdock v. Stickney*, 8 Cush. 113, 115. But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it this character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. Certainly fishing and fowling are as really garded, on navigable waters, as trade and agriculture, though not mentioned in the case cited above; and in *West Roxbury v. Stoddard*, 7 Allen, 158, 171, it is said that the use of great ponds, which are public property, may as well be for bathing, boating, skating, fishing and fowling, as for business, and is entitled to equal consideration. If water is navigable for pleasure boating, it must be regarded as navigable

> water, though no craft has ever been upon it for the purposes of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation. The use that is actually made of Mystic River proves that it is navigable."
>
> *Attorney General v. Woods*, 108 Mass. 436-9.

In the several states of the union, the common law as declared from time to time by the courts, is as binding and as sacred as statute law. The highest court of Minnesota has adopted the rule as of the common law that railway companies hold their charters subject to the right of the public to reasonable crossings. In the later cases, including that under review, no claim was made of express statutory basis.

State ex rel. City v. St. P., M. & M. R. Co., 98 Minn. 380.

The instant case, 115 Minn. 460.

City v. M. St. R. Co., 115 Minn. 514.

T. C. S. Co. v. C., M. & St. P. R. Co., 118 Minn. 491.

The very latest utterance on this question is from the Supreme Court of Indiana in a case in which a railroad company attempted to recover substantial damages in a proceeding for opening a highway across its right-of-way and offered to show by a witness that the value of the use of the company's railroad and property would be diminished from $200 to $1,000. The offer was rejected and the ruling was sustained by the higher court, which said:

"In *New York, Etc., R. Co. v. Rhodes,* (1909) 171 Ind. 521, 525 86 N. E. 840; 24 L. R. A. (N. S.) 1225, it was held that a railroad company, having accepted the privileges and franchises from the state and acquired its right-of-way subject to the right of the state to locate and maintain its public highway (section 5195, ch. 5, Burns 1908), is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of such statute as to highway crossings. *Even in the absence of such a statute* as section 5195, *supra*, the rule is that a private corporation which acquires a right to construct a railroad takes it subject to the dominant right of the state to cross its railroad whenever the public necessity demands that new roads or streets shall be opened. In accepting a grant from the state, the private corporation impliedly agrees that the sovereign right to provide necessary highways for citizens of the state shall not be impaired. It is considered that there is no taking of property where a public highway crosses a railroad right-of-way and, where as in this instance, the two uses may co-exist; and it makes no difference in the matter of compensation whether the railroad merely owns an easement or the fee. *Elliott on Roads and Streets* (3rd Ed.), Sec. 249, and cases there cited; *Chi. & Erie R. Co. v. Luddington,* (1910) 175 Ind. 35, 40; 91 N. E. 939; 93 N. E. 273, and cases there cited. The authorities just cited establish the lack of merit in the numerous constitutional questions which counsel for appellant raises in the brief in its behalf."

Pittsburg, C., C. & St. L. R. Co. v. Gregg, 102 N. E. 961, decided Oct. 29, 1913.

SUMMARY.

The authorities cited in the different portions of this brief establish, with reference to the duties and obligations of a railroad company where its tracks intersect a public way, the following propositions:

1. Landways and waterways stand upon the same footing.

2. Recreation and pleasure uses are entitled to the same protection as commercial uses. They promote the health, good order and good character of the community.

3. Natural highways and artificial highways are subject to the same rules. In either case the public use is controlling.

4. Priority in time of establishment is immaterial.

5. The duty of making the crossing safe at its own expense is upon the railroad company.

6. If the crossing is of such a character that the company must build a bridge to re-connect its rails, the company cannot claim reimbursement from the public for the cost of the bridge as part of its damage in eminent domain proceedings.

An affirmance of the judgment of the State Supreme Court is respectfully urged.

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